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DUTIES OF BANKS AS DEPOSITARIES OF TRUST FUNDS

It is the custom of banks to allow a depositor holding trust funds to deposit those funds in his individual account. This practice is due to the hesitancy on the part of bank officials to advise the customer to keep a separate account. The depositor may well draw the inference that such a course is suggested in order to avoid undesirable irregularities, and as a result the bank may lose both his fiduciary and individual deposits.¹ Where a trustee, or other fiduciary, offers for deposit in his own name trust funds, known by the bank to be such, mere allowance of the deposit does not render the bank liable as a participant in a breach of trust. If the trustee checks out the trust money for the payment of his individual debts, and the bank does not know the purpose for which the funds are withdrawn, it does not have to account to the beneficiary.² The bank is under no duty to investigate the propriety of every withdrawal, and is permitted to assume that the trustee is acting within the terms of the trust. The reason for this is that such an investigation would impose too great a burden upon a bank. Where, however, the bank knowingly participates in or receives a benefit from an improper withdrawal, it is held liable for the funds so diverted. Thus if the trustee or other fiduciary draws on the trust funds, or on his own account containing trust funds,³ in order to pay his personal indebtedness to the bank, the bank is considered to have knowledge of the conversion, and becomes liable therefor.⁴ Of course, when there is actual knowledge of an improper withdrawal by a trustee, it is the duty of the bank to prevent it, and its failure to prevent it is not excused although it would receive no benefit from it.⁵

¹ McCollom, *Liability of Banks Receiving Checks To a Trustee's Order For Deposit in His Individual Account* (1911) 11 COL. L. REV. 428.

² *Santa Marina Co. v. Canadian Bank* (1918, C. C. A. 9th) 254 Fed. 391 (corporate officer); *United States, etc., Co. v. First Nat. Bank* (1912) 18 Calif. App. 437, 123 Pac. 352 (guardian); *Batchelder v. Central Nat. Bank* (1905) 188 Mass. 25, 73 N. E. 1024 (trustee); *Brookhouse v. Union Publishing Co.* (1905) 73 N. H. 368, 62 Atl. 219 (guardian); *Gate City B. & L. Ass. v. Bank* (1894) 126 Mo. 82, 28 S. W. 633 (corporate officer); *State v. Chicago Bonding and Surety Co.* (1919, Mo.) 215 S. W. 20 (receiver); *Bischoff v. Yorkville Bank* (1916) 218 N. Y. 106, 112 N. E. 759 (executor); *Safe Deposit & Trust Co. v. Bank* (1900) 194 Pa. 334, 44 Atl. 1064 (administrator); *United States Fidelity & G. Co. v. Bank* (1916) 77 W. Va. 665, 88 S. E. 109 (administrator); *contra, Bank v. McPherson* (1912) 102 Miss. 852, 59 So. 934 (public officer); *United States Fidelity & G. Co. v. Bank* (1913) 127 Tenn. 720, 157 S. W. 414 (guardian).

³ The account must actually contain trust funds before the check is charged to the account by the bank, and the check must withdraw all the personal deposits, if any, and some of the trust deposits before the bank is held liable. See Thulin, *Misappropriation By Fiduciary* (1918) 6 CALIF. L. REV. 171, 186.

⁴ *United States Fidelity & G. Co. v. Union Bank* (1915, C. C. A. 6th) 228 Fed. 448; *First Nat. Bank v. Greene* (1908, Ky.) 114 S. W. 322; *Allen v. Puritan Trust Co.* (1912) 211 Mass. 409, 97 N. E. 916; *Bischoff v. Yorkville Bank*, *supra* note 2.

⁵ *Lowndes v. City Nat. Bank* (1909) 82 Conn. 8, 72 Atl. 150; *National Bank v. Munger* (1899) 36 C. C. A. 659, 95 Fed. 87.

The courts of New York, however, have imposed upon the banks greater burdens in relation to fiduciary funds than have been imposed in other jurisdictions. Distinguishing cases of corporate officers from other classes of fiduciaries, they have imposed upon the banks more stringent duties in their relation to the former. A bank cannot safely accept a check payable to a corporation for deposit in the individual account of the president or other officer, even if it is properly indorsed by him for the corporation. Although the officer may have the authority to indorse all checks made payable to the corporation, he may not have the privilege to deposit the proceeds therefrom in his individual account. The form of the check is considered as notice to the bank that it is the property of the corporation and the bank must, at its peril, inquire concerning the authority of the officer to deposit in his personal account. If the bank fails to do so it becomes liable if the officer draws out the proceeds of the check for personal purposes.⁶

The New York Court of Appeals has departed from the general rule even where the fiduciary is not a corporate officer. In *Bischoff v. Yorkville Bank*⁷ an executor withdrew trust funds, known to the bank to be such, and deposited them in his general account in order to pay his personal debts, one of which was an indebtedness to the bank. The court in that case said that "a fiduciary may legally deposit the trust funds in a bank to his individual account and credit. Knowledge on the part of the bank of the nature of the funds received and credited does not affect the character of the act. The bank has the right to presume that the fiduciary will apply the funds to their proper purposes under the trust."⁸ "A bank does not become privy to a misappropriation by merely paying or honoring checks of a depositor drawn upon his individual account in which there are, in the knowledge of the bank, credits created by deposits of trust funds."⁹ But where the fiduciary drew on the trust funds to pay a personal indebtedness to the bank the bank had actual notice that the fiduciary was misapplying those trust funds. Furthermore, it could no longer presume that the executor was properly applying the funds, and was under a duty to inquire as to the purpose of all subsequent withdrawals. By failing to make such inquiry the bank became liable not only for the amount which it had itself received, but also for all money thereafter converted by the trustee. The holding in the *Bischoff* case that the bank was not liable for the amounts withdrawn by the executor before the payment of his

⁶ *Wagner Trading Co. v. Battery Park Nat. Bank* (1920) 228 N. Y. 37, 126 N. E. 347. Where an officer of a corporation authorized to sign checks therefor wrongfully drew checks to his own order and deposited it in his individual account, see *Havana C. Ry. v. Knickerbocker T. Co.* (1910) 198 N. Y. 422, 92 N. E. 12 (that depository bank is not liable); *Havana Central Ry. v. Central Trust Co.* (1913) 123 C. C. A. 72, 204 Fed. 546 (that drawee bank is not liable).

⁷ *Supra* note 2.

⁸ 218 N. Y. at p. 111, 112 N. E. at p. 760.

⁹ 218 N. Y. at p. 112, 112 N. E. at p. 761.

indebtedness to the bank is, as shown above, in accord with the great weight of authority. The holding that the bank was liable for the amounts paid to it in discharging the executor's individual indebtedness to it, is likewise generally accepted. But the case, so far as it held the bank liable for the amounts withdrawn by the executor after the payment of his indebtedness to the bank, and not used in paying the bank, went much further than any prior decision.¹⁰

The recent case of *Whiting v. Hudson Trust Company* (1922) 202 App. Div. 375, 195 N. Y. Supp. 829, the court being divided, shows a tendency to hold banks liable for all conversions of trustees or other fiduciaries who deposit trust funds in their individual accounts. In that case one Eckerson having an individual account in the defendant bank informed the bank that for purposes of bookkeeping he desired to open another separate individual account. The bank suggested that it be designated as Number 2 or "Special," and it was decided that it should be called "special" account. In this account Eckerson deposited five checks belonging to a trust fund, one payable to him as "trustee" and four as "executor." Eckerson converted the proceeds of these checks, and the bank was held liable.

The following quotations show the basis of the court's decision: ". . . the check was made to the order of Eckerson as 'trustee' a circumstance which in itself would have attracted the special attention of any prudent bank official that it involved a fiduciary relationship . . ."¹¹ "With respect to these 'executor' checks the defendant trust company had notice upon the face of the checks that they did not belong to Eckerson individually and they were charged with the duty of inquiring as to Eckerson's relationship to these checks."¹² "The rule outlined in *Bischoff v. Yorkville Bank* related to a general account of a depositor and not to a special account as that before us."¹³ It is submitted that this language cannot be reconciled with the *Bischoff* case.¹⁴ The statement that the checks payable to Eckerson as executor charged the bank with the duty of inquiring as to Eckerson's relationship to these checks is diametrically opposed to the holding in the *Bischoff* case. The fact that the funds were kept in a "special" account does not seem to be sufficient basis for a distinction.

¹⁰ For discussions of *Bischoff v. Yorkville Bank*, *supra* note 2, see Scott, *Participation In a Breach of Trust* (1921) 34 HARV. L. REV. 454, 477; (1916) 4 VA. L. REV. 153; (1916) 16 COL. L. REV. 341.

¹¹ (1922) 202 App. Div. 375 at p. 379, 195 N. Y. Supp. 829 at p. 832.

¹² *Ibid* at p. 383, at p. 835.

¹³ *Supra* note 12.

¹⁴ The recent case of *Wagner Trading Co. v. Battery Park National Bank*, *supra* note 5, held the bank liable for the conversion by a corporate officer where the bank allowed the officer to deposit checks payable to the corporation and properly indorsed by him in his individual account. In view of the *Wagner* case the principal case was not wholly unexpected by the banking world. See (1920) 37 BANKING L. JOUR. 505.

It is important to note that since the occurrence of the facts in the principal case a statute¹⁵ has been enacted in New York which makes guilty of a misdemeanor every executor, administrator, guardian, or testamentary trustee who deposits in his own name funds received from the estate of any deceased person. It seems that by force of this statute a bank which has knowledge will be held liable for all funds so deposited and converted by these fiduciaries, thereby furnishing a salutary check upon undesirable irregularities. If such fiduciaries are permitted by the banks to deposit trust funds only in an account labeled as a fiduciary one, the fiduciary will find it more difficult to pay his individual debts from the trust funds. A check will have to be signed in his fiduciary capacity and will be a warning on its face to all who accept it that they are accepting trust funds and that they will be liable to the beneficiary of the trust for its conversion by the trustee.¹⁶ The beneficiary has not this protection where the trustee is allowed to deposit funds in his individual account.

DOES BREACH OF CONTRACT DESTROY DUTY TO PERFORM?

Has one who has contracted to sell certain specific chattels to another the "right," after having refused to keep the contract, to sell the chattels to someone else? A majority of the court so held in *Hong Hoon v. Lum Wai* (1922) 26 Haw. 541, a case in which the chattels were of such a character that specific performance would not be decreed.¹ One member of the court dissented, asserting that the seller had the *power*, but not the *right*, to make such a sale. The essential facts were briefly these: The plaintiffs contracted to sell to the defendants, and the defendants agreed to buy, all the "marketable taro" that might be grown by the sellers on certain lands, for the period of two years. After a few months the sellers broke the contract and refused to make further delivery. The buyers brought a suit for specific performance and obtained incidentally a temporary injunction restraining the sellers from delivering the taro to anyone other than the buyers.² The buyers

¹⁵ N. Y. Laws, 1916, ch. 558, sec. 2664a; N. Y. Surro. Ct. Laws, 1920, ch. 928, par. 231. The American Bar Association has approved a Uniform Fiduciaries Act. "The object of the Act is to relieve persons dealing with a fiduciary from the heavy responsibility of a constructive inquiry into the good faith of the fiduciary. In practice such inquiries are impossible in the ordinary course of banking and commercial transactions; and there is involved a risk which should be eliminated, except in cases of knowledge of fraud or personal advantage to the payee or recipient. (1922) 8 A. B. A. JOUR. 641.

¹⁶ Scott, *op. cit.* 459-463.

¹ *Accord*, *New England Box Co. v. Prentiss* (1912) 76 N. H. 313, 82 Atl. 531.

² In the case the additional fact appeared that the buyers had assigned the contract, and the actual suit was by the assignees. This, however, did not alter the substance of the situation.

gave the usual injunction bond to indemnify the sellers for all damage which the latter might suffer "by reason of the issuance of the temporary injunction in the event that it shall be finally determined that the same was improvidently or wrongfully issued." Later a demurrer going to the merits of the bill was sustained and the injunction dissolved, on the ground that the remedy at law was adequate. The sellers had in the meantime, because of the coercion of the injunction, delivered the taro to the buyers at the equivalent of the contract price. The sellers now sued the buyers on the injunction bond, claiming to recover the difference between the contract price and the price which, but for the injunction, they could have obtained in the market. As indicated above, this contention of the sellers was approved by a majority of the court. It is believed that a somewhat more careful analysis than that used by either the majority or minority of the court will serve to state the problem of the case more clearly and thus open the way to a satisfactory solution.

Given a contract for the sale of chattels of such a character that specific performance may not be had, what is the legal situation: (1) before breach and refusal of further performance by the seller; (2) after such breach? Before breach, clearly a right-duty relation exists between the two parties. If the seller refuses to perform this duty, the common law will not attempt to make him do so; it will confine its activities to giving damages. Equity will keep its hands off. Clearly the breach by the seller has altered the legal situation; a new right-duty relation, requiring the payment of damages, has come into existence. Such a legal relation may be called secondary or remedial as distinguished from primary or antecedent.³ Does the primary right-duty relation also continue to exist? To some extent courts and legal writers seem to think that it does. Witness the rule followed by most courts that doing or promising again to do the thing required by the original right-duty relation is not a good consideration to support a promise, the argument being that there is already in existence a *duty* to do the act or acts in question, even after breach. There seems, however, to be no direct sanction for this supposed "duty"—it cannot be "broken" so as to give rise to another and different secondary or remedial right, either to damages or specific performance. Moreover, it would seem

³ The distinction between primary and secondary rights is, like all other classifications of rights, one of convenience. When one owns a chattel, for example, we say that he has a right, or, better, rights, that other persons refrain from dealing with it except in certain authorized ways; these are *primary* or *antecedent* rights. When someone violates one of these rights, a new right-duty relation requiring the payment of damages arises. This is for convenience called a secondary or remedial relation, as it is given in order to vindicate or sanction the primary right. Cf. Hohfeld, *Fundamental Legal Conceptions* (1923) 151, note 32.

that the existence of the misnamed "duty to mitigate damages"⁴ on the part of the buyer in such a case as we are considering, is inconsistent with the exception that the duty to deliver still exists. If the latter were the true view, it would seem that the buyer ought to be allowed to treat the contract as a going concern, so to speak, without being under the necessity to take steps to mitigate the damages. If, therefore, the duty to deliver is conceived of as still existing, the concept of duty is necessarily widened to include a legal relation of exceedingly imperfect sanction, for the only sanction is the one involved in the rule about consideration previously referred to.⁵ Moreover, is not the refusal to decree specific performance based on the idea that where damages are adequate, the person bound by the contractual duty ought to be left free to pay damages in lieu of performing?⁵

⁴There is obviously no *duty* in any accurate sense of the term, to mitigate damages; that is, the one under the so-called duty does not commit a legal wrong by failing to do so. Cf. Burch, J., in *Rock v. Vandine* (1920) 106 Kan. 588, 189 Pac. 157. The opinion in that case is interesting for the reason that it incorporates for the first time into a judicial opinion the Hohfeld table of jural relations. In cases involving so-called anticipatory breach the situation between the time of the breach and the time when it becomes necessary for the other party to incur expense if he is to treat the contract as a going concern, involves nice points of analysis with which it is beyond the scope of the present comment to deal.

⁵It may well be that an adequate analytical jurisprudence will compel the recognition and careful discussion of what may be called "imperfect" legal relations. For example, the statement that a wife is under a duty to nurse her husband when ill and that therefore doing so, or promising to do so, is not a sufficient consideration to support a promise, would probably not be dissented from by most lawyers. The *duty* in such a case, if it be called a duty, lacks the ordinary sanctions—no action by the husband against the wife, for damages or specific performance, will lie. Nevertheless, there is what it is at least possible to regard as a kind of indirect sanction, and our fundamental legal concepts must be so formed as to take into account such situations. It is, however, not intended to do more here than to suggest the nature of the problem, without attempting a solution.

The rule about consideration mentioned in the text may be unheld without taking the view that a "duty" to perform still exists after breach. It would seem sound policy not to permit a promisor ordinarily to obtain additional reward by refusing to keep a contractual obligation. If this be, as the present writer believes, the only real justification for the rule, it is possible to approve of cases (such as *King v. Duluth M. & N. Ry.* (1895) 61 Minn. 482, 63 N. W. 1105) which hold that if one does, or promises to do, acts which he is already under a duty to do (in the imperfect sense above described), there is sufficient consideration if there turns out to be some unforeseen difficulty or hardship in the first contract, provided one reaches the conclusion that such a result is consistent with sound economic and business policy.

⁶This does not mean that prior to breach there is no legal duty to perform, but merely that the only coercion which will be brought to bear in order to induce performance of the duty is the threat of being required to pay damages. When that threat proves insufficient to prevent the breach, as in the instant case, the view in the text simply is that the law puts an end to the duty to perform and

We may express this view of the situation by saying that the seller has, before breach, the legal *power* by breaking the contract and refusing further performance, so to alter the legal relations of the parties that the original or primary right-duty relation requiring delivery of the goods as promised, is brought to an end, and there is substituted therefor a secondary or remedial right-duty relation requiring the payment of damages only. If this analysis, which is merely an attempt to state clearly the results reached by the courts, is sound, it seems that after breach the seller in the case at hand has the legal privilege⁷ to sell the goods where he pleases. He is the complete owner of them, both at law and in equity, and there is no longer even a contractual duty to the buyer to deliver them to him. True, the seller must pay the damages caused by the wrongful exercise of his legal power to put an end to his contractual duty to deliver; but that is all. The seller is legally free, on the other hand, to protect himself from loss by selling in the open market if he wishes.

In the principal case, it turned out, the temporary injunction was erroneously issued, that is, while binding until reversed, the granting of it was contrary to the rules governing the exercise of equitable jurisdiction in specific performance cases in the particular jurisdiction; and it prevented the plaintiff (defendant in the specific performance suit) from exercising his legal "right," that is, his privilege, to sell to whom he pleased. He should not have been so prevented, but should have been left free to sell where he pleased, paying whatever damages might be inflicted on the buyer by his breach of contract. It is to indemnify against just such erroneous prevention of the exercise of legal privileges that injunction bonds are required. Plaintiffs who in perfect good faith obtain temporary injunctions are required to run just such risks.⁸ Fundamentally, of course, such a rule, like any other rule of law, must

substitutes merely a duty to pay the damages caused by the breach. Holmes' well-known statement in *The Common Law* (1881) 301, to the effect that a person is free to break a contract, is often misinterpreted. It does not deny the existence of a legal duty to keep a contract, but merely asserts that the law leaves a person free from physical coercion. Thus interpreted, the statement seems true enough, but is open to the objection that it is likely to be misleading. "Free" does not mean *legally* free, that is, legally privileged. It would seem that in Holmes' sense a man is equally "free" to commit torts, except in cases where physical coercion (injunction, etc.) will be used to prevent him from so acting. It may be doubted whether this is the best way to put the matter.

⁷ "Privilege" means here "permissive right" or "liberty," that is, that the one having the legal privilege is under no duty to refrain from doing the act or acts in question. Hohfeld, *op. cit. supra* note 3, 38.

⁸ For example, in case of a *bona fide* dispute over ownership of land, a plaintiff obtaining a temporary injunction restraining, for example, the mining of ore, must give an injunction bond under which, if it turns out that the defendant owns the land and so was restrained from exercising his privileges of ownership, the plaintiff will have to pay to the defendant the damages caused by such deprivation of privilege.

be defended upon grounds of policy. In the principal case, it seems difficult to disagree with the majority without making up our minds that the primary duty to keep the promise to deliver ought to be regarded as still alive after breach and repudiation. If so, it would seem that we ought, if we are to be reasonably consistent, to give to such duty some greater sanction than the imperfect one discussed above. Inasmuch as we do not do that, the view that the primary duty comes to an end with the breach and that there takes its place a duty to pay damages, appears on the whole more consistent and harmonious with the rule denying specific performance in cases like the one before the court. It need hardly be added that the case is quite otherwise when specific performance may be had. Perhaps the present writer ought also to say that he sees no reason why it would not be good policy to decree specific performance in many cases in which we now say—not very truthfully, if we look economic facts in the face—that the remedy at law by way of damages is adequate; and that this is especially true of all such contracts as that involved in the principal case.

Before dismissing the case it should be noted that the majority of the court recognized that the buyer was entitled to recover from the seller damages for the breach of contract, and that the amount of these damages might equal that recovered by the seller in the instant case. It was, however, held that under the procedure in the particular jurisdiction the damages for breach of contract could not be recouped in this action by the seller on the injunction bond, on the ground that the claim sought to be recouped "must arise out of the same transaction or subject matter as the demand sued for." In many jurisdictions it could, of course, be enforced by way of set-off or counterclaim.

W. W. C.

JOINDER OF ACTIONS AND OF PARTIES

At common law as well as under the original codes of procedure the subjects of joinder of causes of action and joinder of parties were considered as entirely separate and distinct matters, controlled by entirely dissimilar rules. In practice, however, they often overlap and the rules as to each become concurrent restrictions when applied to a particular case. Thus, while a suit between a single plaintiff and a single defendant may raise the subject of joinder of causes alone, a suit where on either side there is more than one party may raise both questions unless the parties are united in interest. The failure of the drafters of codes to appreciate the effect of this interrelation of the subjects has led to much difficulty and confusion in the cases.

Several tests were ordinarily used at common law to determine the question of joinder: the use of the same process; the form of the action; identity of pleas; identity of judgments.¹ The "dead hand of the common law" rules us from its grave, for even with the intro-

¹ Sunderland, *Joinder of Actions* (1920) 18 MICH. L. REV. 571, 573-578.

duction of code pleading, the legislatures were unable to free themselves from the common-law precedents which called for a formal test of some kind. Hence we have in most of our codes a fixed classification based upon similarity in subject matter, joinder being permitted only of those causes of action falling within the named subdivisions.² The theory of this classification is hard to justify.³ Thus, why should all contract actions be joinable while tort actions are joinable only under certain circumstances, and this under a code abolishing forms of actions? If by such provisions the legislatures were attempting to formulate rules of convenience of trial, they were obviously undertaking a difficult task, for it is nearly impossible to foretell just what combinations will be convenient. Realizing this difficulty, a few states have rejected the theory that *a priori* restrictions are helpful, and now allow, in the discretion of the trial court, practically an unlimited freedom of joinder.⁴

The rule governing the joinder of plaintiffs in a common-law action turned on the distinction between joint and several interests. If the defendant was legally answerable to two or more jointly, all of them would have to join as plaintiffs in the action unless a valid excuse for non-joinder appeared on the face of the pleading.⁵ If the interests were several there could be no joinder even where the rights of all the plaintiffs had been violated by one and the same wrongful act.⁶ The equity rule seems rather to have considered what was convenient under the particular circumstances, the matter being within the discretion of the trial court.⁷ Most of the codes, although combining legal and equitable procedure and adopting the equitable rules permitting joinder of parties, strangely enough reflected the influence of the common-law rules rather than those of equity. Thus as to plaintiffs, only those having an interest in the *subject of the action* and in obtaining the *relief* demanded could join, while to be joined as a defendant one must have or claim an interest in the *controversy* adverse to the plaintiff, or must be a party necessary for the complete determination or settlement of the *question* involved therein.⁸ The subject was tied up with that of joinder of actions by the requirement that all actions united in the same complaint "must affect all parties to the action."⁹ Under the latter provision, different persons having separate causes of action, although arising from the same transaction, could not unite in bringing suit.¹⁰

² Statutes are collected in Sunderland, *Cases on Code Pleading* (1913) 192.

³ Sunderland, *supra* note 1, at p. 579.

⁴ Kan. Gen. Sts. 1915, sec. 6979; Iowa Code, 1897, sec. 3545; Mich. Comp. Laws, 1915, sec. 12309; N. J. Prac. Act. 1912, secs. 6, 11, and rule 21.

⁵ *Sweigart v. Berk* (1822, Pa. Sup. Ct.) 8 Serg. & R. 308; 30 Cyc. 106.

⁶ Pomeroy, *Code Remedies* (4th ed. 1904) 215.

⁷ Story, *Equity Pleading* (8th ed. 1870) secs. 284, 530.

⁸ Sunderland, *supra* note 2, at p. 79, containing a collection of statutes.

⁹ Sunderland, *supra* note 2.

¹⁰ *Midland Terra Cotta Co. v. Illinois Co.* (1916) 163 Wis. 190, 157 N. W. 785; *Gardner v. Rumsey* (1921) 81 Okla. 20, 196 Pac. 941; *Ryder et ux. v. Jefferson Hotel Co.* (1922, S. C.) 113 S. E. 474.

In England, the criterion of convenience rather than that of the interest involved has been adopted. "All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief. . . ."¹¹ Substantially the same provision is to be found in the present New York Civil Practice Act.¹² Such provisions have the beneficial effect of permitting persons injured in a single accident or by any other single tortious act of another person or persons to sue together, thus avoiding multiplicity of actions with resulting delay and expense.¹³

As long as the action is against one defendant only or against several defendants sought to be made liable jointly, there is little difficulty in applying this rule. A different question arises where two or more defendants are sued each on a several liability. Prior to the amendment of Order 16, Rule 1, the House of Lords had decided that Order 16 related only to the joinder of parties in respect to the *same* cause of action.¹⁴ Consequently the amendment was passed giving it the form indicated above, but no change was made in Order 16, Rule 4,¹⁵ which governed the joinder of defendants.¹⁶ Despite the conflicting decisions rendered under Order 16 in its amended form,¹⁷ it seems from a series of recent cases which have come before the English Court of Appeal and in which the entire Order has been construed liberally that the present English scheme of practice permits the joinder of plaintiffs *or* defendants on practically the same terms, namely, where claims arise out of the same transaction or series of transactions and there is a

¹¹ Rules of the Supreme Court, 1883, Order 16, Rule 1. Words within the brackets added by amendment of October 26, 1896.

¹² Civil Practice Act, N. Y. Laws, 1920, ch. 925, sec. 209.

¹³ White, King, and Stringer, *The Annual Practice* (1922) 195; Medina, *Some Phases of the New York Civil Practice Act and Rules* (1921) 21 COL. L. REV. 113, 121.

¹⁴ *Smurthwaite v. Hannay* [1894, H. L.] A. C. 494. Where there were separate causes of action joinder of several plaintiffs was disallowed.

¹⁵ "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

¹⁶ Prior to the alteration of Order 16, Rule 1, the House of Lords held that claims for damages against two or more defendants in respect of their several liability for separate torts could not be combined in one action by reason of Order 16, Rule 4. *Sadler v. Great Western Ry.* [1896, H. L.] A. C. 450.

¹⁷ White, King, and Stringer, *op. cit.* 223.

common question of law or fact; subject to the discretion of the court, however, to sever the actions or adopt such other remedial means as will prevent embarrassment or prejudice.¹⁸

The provisions in the present New York Civil Practice Act regarding joinder of plaintiffs and joinder of defendants are practically the same as those which exist in England.¹⁹ Hence it was to be expected that the New York courts would be confronted with the same difficulties that faced the English courts after the amendment of Order 16 in 1896. The problem was squarely presented in the recent case of *S. L. & Co. v. Bock* (1922, Sup. Ct.) 118 Misc. 756, 194 N. Y. Supp. 773.²⁰ The action was brought to recover the reasonable rental value of certain apartments in New York City. Seven individuals were named as defendants. The complaint alleged that all of the defendants were tenants in the same house, each occupying a separate apartment. The plaintiff demanded a separate judgment against each defendant for the reasonable rental value of the apartment occupied by him. The defendants moved for an order dismissing the complaint on the ground of misjoinder. The court, following the interpretation of Order 16 as given by the recent English cases, allowed the joinder, the claims having arisen out of the same set of circumstances and involving a common question of fact. Such a liberal construction of the new Act is to be commended.

In adopting the present New York Civil Practice Act the legislature apparently failed to appreciate the intimate connection between joinder of parties and joinder of causes of action, for although it adopted the English rule as to the former, it failed to do so with respect to the latter. In England, with the exception of actions for the recovery of land²¹ and actions by a trustee in bankruptcy,²² the plaintiff may, without leave but subject to the discretion of the court,²³ join all his causes of action whatever they may be. Although the Board of Statutory Consolidation in its report of 1915²⁴ recommended the adoption of the English precedent, the recommendation was not followed. Instead, the New York Civil Practice Act limits the joinder of actions by permitting it in only the twelve specified classes of the previous code.²⁵ Why New York should have chosen twelve classes and other states varying numbers—usually from three to seven—is not easily explained. While it is no longer necessary under the Civil Practice

¹⁸ *Oesterreichische Export A. G. v. British Indemnity Ins. Co.* [1914, C. A.] 2 K. B. 747; *Thomas v. Moore* [1918, C. A.] 1 K. B. 555; *Payne v. British Time Recorder Co.* [1921, C. A.] 2 K. B. 1.

¹⁹ Civil Practice Act, *supra* note 12, secs. 209, 211.

²⁰ See (1922) 71 U. of P. L. REV. 87.

²¹ Rules of the Supreme Court, 1883, Order 18, Rule 2.

²² *Ibid.* Rule 3.

²³ *Ibid.* Rules 1, 8, 9.

²⁴ *Report of Board of Statutory Consolidation on Simplification of Civil Practice* (1915, N. Y.) Rule 181.

²⁵ Civil Practice Act, *supra* note 12, sec. 258.

Act that all the causes of action joined in the same complaint affect all the parties,²⁶ this definite limitation is still placed upon the character of the causes of action that may be joined. This was brought out clearly in another recent New York case²⁷ in which the court held that a count for injuries to premises could not be joined with a count for reasonable rental value.

The conclusion concerning the entire subject of joinder ought to be that it, like all procedural subjects, should be relegated to its appropriate subordinate position of being not an end in itself but merely a means to an end—the doing of substantial justice to the parties litigant according to rules of substantive law. Hence the test would be how those rules of substantive law may be most conveniently and expeditiously applied to the matters in issue between the parties. Where claims by or against different parties arise out of the same transaction or series of transactions and involve a common question of law or fact—thus rendering it desirable that the whole of the matter should be disposed of at the same time—it should be within the discretion of the court to allow the joinder of plaintiffs or defendants. Nor is there any necessity for adhering to such artificial restrictions in regard to joinder of causes of action as are found in most of the code states. In this field also there should be allowed in the discretion of the trial court a maximum of freedom of joinder, convenience and expedition of trial being the guiding principles.

THE MINIMUM WAGE AND LIBERTY OF CONTRACT

By an Act of Congress a Minimum Wage Board for the District of Columbia was established, with power, after investigation, to fix minimum wages to be paid to women and minors in any occupation. Act of Sept. 19, 1918 (40 Stat. at L. 960). A failure to observe the wages set by the Board would involve punishment by fine and imprisonment. Two bills were brought to enjoin the enforcement of the Act by an employer and an employee respectively. The Court held the law unconstitutional as an unlawful interference with freedom of contract. *Children's Hospital v. Minimum Wage Board*; *Lyons v. Same* (1922, D. C.) 50 WASH. L. REP. 721.

This question is still an open one due to the fact that in the *Oregon Minimum Wage Cases*, which have been the only test cases before the United States Supreme Court, Mr. Justice Brandeis had been of counsel and hence was disqualified. The constitutionality was upheld by a divided court, without opinion, the vote being four to four.¹ Besides the District of Columbia, thirteen states and territories now have mini-

²⁶ *S. L. & Co. v. Bock* (1922, Sup. Ct.) 118 Misc. at p. 761, 194 N. Y. Supp. at p. 777.

²⁷ *137 East 66th Street, Inc. v. Lawrence* (1922, Sup. Ct.) 118 Misc. 486, 194 N. Y. Supp. 762.

¹ *Stettler v. O'Hara*; *Simpson v. Same* (1917) 243 U. S. 629, 37 Sup. Ct. 475.

imum wage laws, Texas having repealed her statute.² Although such a statute was repealed in Nebraska,³ a constitutional amendment was passed later permitting such laws for women and children.⁴ A constitutional amendment in Ohio sanctions such laws for all employees.⁵ The statute in the District of Columbia is typical of those in force in eight states.⁶ Three of these states have held them constitutional,⁷ and five have not yet passed upon them.⁸ The District of Columbia alone has acted unfavorably. Two states and one territory have laws applicable to women only.⁹ In Arizona, Porto Rico, and Utah¹⁰ the rate is fixed directly by the legislature, but the constitutionality of these statutes has not yet been called in question. A Massachusetts statute has been held valid which provides for enforcement by "black-listing" in newspapers.¹¹

No constitution fathers particular economic policies; thus the policy of *laissez faire* does not inhere in the Fifth and Fourteenth Amendments.¹² But this is not equivalent to affirming that the police power is the legitimate means of overturning the existing economic order. The American Constitution postulates a social order; the Bill of Rights is founded on "natural" law, or those fundamental human rights which have been regarded during the development of the common law as the basis of society.¹³ This conception of a social order is vague in its outlines, it is true, and shifting and varying to some degree in its

² Tex. Complete Sts. 1920, tit. 77, ch. 1a, repealed by Gen. Laws, 1921, ch. 118.

³ Neb. Sess. Laws, 1913, ch. 211, repealed by Sess. Laws, 1919, ch. 190.

⁴ Neb. Const. art. XV, sec. 8.

⁵ Ohio Const. art. II, sec. 34.

⁶ These provide for administrative determination of rates, are applicable to both women and children, and penalize violations by fine and imprisonment.

⁷ Or. Laws, 1920, tit. 38, ch. 2; *Stettler v. O'Hara* (1914) 69 Or. 519, 139 Pac. 173; *Simpson v. O'Hara* (1914) 70 Or. 261, 141 Pac. 158; Minn. Gen. Sts. 1913, ch. 23, secs. 3904-3923, amended by Minn. Sess. Laws, 1921, ch. 84; *Williams v. Evans* (1917) 139 Minn. 32, 165 N. W. 495; Wash. Sess. Laws, 1913, ch. 174, amended by *ibid.* 1915, ch. 68, and 1917, ch. 29; *Larsen v. Rice* (1918) 100 Wash. 642, 171 Pac. 1037.

⁸ Deering's Calif. Gen. Laws, 1915, Act 1608, amended by *ibid.* Acts 1917-1919, and Calif. Sts. 1921, ch. 279; Colo. Sess. Laws, 1913, ch. 110, amended by *ibid.* 1917, ch. 98; Kan. Gen. Sts. 1915, ch. 108, art. 42, amended by Kan. Sess. Laws, 1921, ch. 263; N. D. Sess. Laws, 1919, ch. 174; Wis. Sts. 1921, ch. 83, sec. 1729s.

⁹ Ariz. Sess. Laws, 1917, ch. 38; *Crawf. & Moses Ark. Sts.* 1921, ch. 117, secs. 7108-7111, amended by Acts, 1921, Act 140; Porto Rico Sess. Laws, 1919, Act 45. The Arkansas law has been declared constitutional. *State v. Crow* (1917) 130 Ark. 272, 197 S. W. 4.

¹⁰ Utah Comp. Laws, 1917, ch. 4, secs. 3671-3674.

¹¹ Mass. Gen. Laws, 1921, ch. 151; *Holcombe v. Creamer* (1918) 231 Mass. 99, 120 N. E. 354.

¹² See the dissenting opinion of Holmes, J., in *Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539; Pound, *Liberty of Contract* (1908) 18 YALE LAW JOURNAL, 454.

¹³ Kales, "Due Process," *the Inarticulate Major Premise and the Adamson Act* (1917) 26 YALE LAW JOURNAL, 519.

arrangement and substance, but withal reasonably tangible in that it is distinguishable in essentials from socialistic and communistic types. Without some such conception, a constitution is a mere body of maxims of political morality.¹⁴ It has been termed by Professor Kales the "inarticulate major premise" in due process cases. While the court prefers not to tie itself down by proclaiming it, it lies consciously or unconsciously behind its decisions. Our economic system is industrial, competitive, constructed upon a basis of private property privately managed. To strike unduly at this is unconstitutional.

But whatever view of fundamentals we may take, it is impossible not to recognize that in many cases incapacity to deal freely with economic or other advantage has been recognized as necessary to the safety of the social order. A lender is under a disability to buy freely from his debtor an equity of redemption in a mortgage which the latter may desire to sell.¹⁵ The sailor has ever been the ward of the admiralty court.¹⁶ Usury laws have restricted the returns on capital.¹⁷ There is no freedom to drive hard bargains with heirs for their expectancies.¹⁸ And in general when knowledge and experience are all on one side the advantage may not be unduly pressed.¹⁹ The *Lochner* case,²⁰ to which the instant case reverts, has been thoroughly discredited.²¹

Thus, even granting the Minimum Wage Law to be a restraining of an advantage purely economic (and it is not, for physical disabilities—which no social system can alter—are directly concerned), it is backed by unquestionable analogy in precedent. Moreover, does it not seem impossible to deny that the refusal of a privilege to pay starvation wages to women and children is reasonably calculated to increase the security of the social order, rather than diminish it?

VALUATION IN RATE-MAKING

Although the fixing of rates is primarily a legislative function, the courts are confronted with this problem when they are called upon to determine the reasonableness of those rates.¹ It is not sufficient for them to say that a fair or reasonable rate is a fair return on a fair value,

¹⁴ J. B. Thayer, *Legal Essays* (1908) 2.

¹⁵ *Peugh v. Davis* (1877) 96 U. S. 332.

¹⁶ COMMENTS (1923) 32 YALE LAW JOURNAL, 280.

¹⁷ *Coast Finance Corp. v. Powers Furniture Co.* (1922, Or.) 209 Pac. 614; (1923) 32 YALE LAW JOURNAL, 412.

¹⁸ *Spears v. Spaw* (1909, Ky.) 118 S. W. 275; 25 L. R. A. (N. S.) 436, note.

¹⁹ In further analogous situations the Supreme Court has upheld governmental regulation. *Knoxville Iron Co. v. Harbison* (1901) 183 U. S. 13, 22 Sup. Ct. 1 (mode of wage payment prescribed); N. Y. Laws, 1920, ch. 944 (legislation fixing rents); see *Brown Holding Co. v. Feldman* (1921) 256 U. S. 170, 41 Sup. Ct. 465.

²⁰ *Supra* note 12.

²¹ *Bunting v. Oregon* (1917) 243 U. S. 426, 37 Sup. Ct. 435.

¹ The ancient common-law rule permitted public utilities to fix their own charges with the qualification that they must confine themselves to taking only reasonable

because, strictly speaking, rate determines value.² Several theories have been developed for determining the valuation on which rates are to be based. The first, that based on capitalization, has not met with approval,³ because, if the par value of the bonds and stock be taken as the criterion, the rates will often yield a return on much watered stock; on the other hand, if the market value of the securities is used, the "vicious circle" will again be in operation. Another is the value of the service rendered the public. This test by itself is clearly unworkable because of uncertainty.⁴

The leading case, *Smyth v. Ames*,⁵ lays down the present fair-value rates. *Allnut v. Inglis* (1810) 12 East, 527; *Munn v. Illinois* (1876) 94 U. S. 113. Today the "due process clause" of the Fourteenth Amendment is construed to prevent the imposing of rates on a utility which are confiscatory in their effect. *Southern Iowa Elec. Co. v. City of Chariton* (1921) 255 U. S. 539, 41 Sup. Ct. 400; *Norfolk & W. Ry. v. Conley* (1915) 236 U. S. 605, 35 Sup. Ct. 437; *Northern Pac. Ry. v. North Dakota* (1915) 236 U. S. 585, 35 Sup. Ct. 429; Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE LAW JOURNAL, 781; Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation* (1921) 30 *ibid.* 681; as to the power of the legislature, see *C. B. & Q. Ry. v. Iowa* (1876) 94 U. S. 155.

²"A mine, a railway, a parcel of real estate, a factory, each is valued on the basis of its net income. . . . In the world of affairs . . . all property is valued in terms of its income; all that brings in an income is alike capital, and all is measured or capitalized on the basis of its income." 2 Taussig, *Principles of Economics* (2d ed. 1920) 118; Hale, *The "Physical Value" Fallacy in Rate Cases* (1921) 30 YALE LAW JOURNAL, 710.

³*Smyth v. Ames*, *infra* note 5; 2 Wyman, *Public Service Corporations* (1911) secs. 1091-1098, and cases there cited.

⁴Edgerton, *Value of the Service as a Factor in Rate Making* (1919) 32 HARV. L. REV. 516. It is simply another way of saying that the rate must be fixed between limits set by the cost of service, and what policy dictates its value to be to the public. Mr. Justice Swayze's definition of a fair rate is: "On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand, it can never be made by compulsion of public authority so low as to amount to confiscation. A just and reasonable rate must ordinarily fall somewhere between these two extremes, so as to allow both sides to profit by the conduct of the business and the improvements of methods and increases of efficiency. . . . To induce the investment and continuance of capital there must be some hope of gain commensurate with that realizable in other business; the mere assurance that the investment will not be confiscated will not suffice." *Public Service Gas Co. v. Public Utility Commissioners* (1913) 84 N. J. L. 463, 471, 87 Atl. 651, 655, *aff'd* 87 N. J. L. 581, 95 Atl. 1079.

⁵(1898) 169 U. S. 466, 18 Sup. Ct. 418. In *Brymer v. Butler Water Co.* (1897) 179 Pa. 231, 250, 36 Atl. 249, 251, the following language is used: "Ordinarily, that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the cost of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, no less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair return to the owners of the property, cannot be said to be unreasonable."

theory, and this is the theory almost exclusively applied today.⁶ Mr. Justice Harlan said that the fair value depended upon the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses. The Supreme Court sensed the difficulties of this rule, and in the *Minnesota Rate Cases*⁷ suggested that "the ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." Attempts to apply this unwieldy rule have led to bizarre results because of the inherent fallacy of its economic basis.⁸ Besides being difficult of application because of the numerous elements to be considered,⁹ it is open to objection on the ground that it allows a company to profit directly by its unearned increment.¹⁰

⁶ Wyman, *op. cit. supra* note 3, sec. 1099 and cases cited; *Lincoln Gas & Electric Co. v. Lincoln* (1919) 250 U. S. 256, 39 Sup. Ct. 454; *Denver v. Denver Water Co.* (1918) 246 U. S. 178, 38 Sup. Ct. 278; *Des Moines Gas Co. v. Des Moines* (1914) 238 U. S. 153, 35 Sup. Ct. 811; *Landon v. Court of Industrial Relations* (1920, Kan.) 269 Fed. 433; *Consolidated Gas Co. v. Newton* (1920, S. D. N. Y.) 267 Fed. 231; *Houston Elec. Co. v. Houston* (1920, S. D. Texas) 265 Fed. 360; *Municipal Gas Co. v. Public Service Com.* (1920, Sup. Ct.) 113 Misc. 748, 186 N. Y. Supp. 541; *Kings County Lighting Co. v. Lewis* (1920, Sup. Ct.) 110 Misc. 204, 180 N. Y. Supp. 570.

⁷ (1913) 230 U. S. 352, 434, 33 Sup. Ct. 729, 754. One court has said that the problem involved is a "question of sound business judgment rather than one of legal formula and must often be tentative, since exact results cannot be foretold," it being "a question of fact to be settled by the good sense of the tribunal it may come before." *State Pub. Util. Comm. v. Springfield Gas & Elec. Co.* (1920) 291 Ill. 209, 125 N. E. 891. One author considers it as experimenting in one limited field with a question of policy. Hale, *Rate Making and the Revision of the Property Concept* (1922) 22 Col. L. Rev. 209. And it has been said that trained judgment is the final and controlling factor to be applied. This amounts to an abandonment of the attempt to construct any rule.

⁸ *Supra* note 2.

⁹ *Lincoln Gas & Elec. Co. v. Lincoln*, *supra* note 6.

¹⁰ "It is insisted that in reproduction estimates the enhanced value of the property between the time of the original location of a railroad through a wilderness or marsh, it may be, is not to be taken into account 40 or 50 years afterwards, when civilization, perhaps largely the result of the expenditures and operations of the road, has increased original values a hundred-fold. . . . The law is perfectly settled, with the obvious view of the matter, that increments and losses alike attach to ownership as to duties and rights pertaining to property." *Louisville & N. Ry. Comm.* (1912, N. D. Ala.) 196 Fed. 800, 821. The public should not be called upon to pay rates that will allow a return on something that has cost the utility nothing; nor if the property depreciates in value should the road bear the loss as it is restricted as to the rates it may charge. For a more complete discussion of the weaknesses of this plan, and advantages of the "prudent

In *Galveston Electric Co. v. Galveston* (1922, U. S.) 42 Sup. Ct. 351, Mr. Justice Brandeis intimated that the "prudent investment" theory of valuation, which is the fourth and last theory, and one that has been proposed by many writers,¹¹ might serve as a better basis for fixing rates. Part of the satisfaction from this intimation was lost, however, when Mr. Justice Clarke disregarded this suggestion in a slightly later case.¹² As yet the courts, unlike the public service commissions, have been unwilling to adopt this theory.¹³ According to this plan the amount actually prudently invested in the plant determines its valuation.¹⁴ It is submitted, however, that in figuring the amount under this theory, allowance should be made for the depreciated purchasing power of the dollar.¹⁵ When imprudent investments, watered stock, and dishonesty are eliminated, a figure closely approximating the value of the property devoted to the public use will be obtained, and this in

investment" theory, see Richberg, *A Permanent Basis for Rate Regulation* (1921) 31 YALE LAW JOURNAL, 262; Hale, *The "Physical Value" Fallacy in Rate Cases* (1921) 30 *ibid.* 710; Henderson, *Railway Valuation and the Courts* (1920) 33 HARV. L. REV. 902; *ibid.* 1031.

¹¹ Hale, *op. cit. supra* note 10; Richberg, *op. cit. supra* note 10; Henderson, *op. cit. supra* note 10.

¹² *Houston v. Southwestern Bell Telephone Co.* (1922, U. S.) 42 Sup. Ct. 486, where the court said: "The 'proper basis for rate making is the fair value of the property at the time of the inquiry,' and not the actual cost of the original plant (the prudent investment theory) as taken by the commission.

¹³ In spite of the fact that their findings may be taken to the courts for review and disapproved, this theory has the support of the vast majority of public utility commissions. *Cavanaugh v. Whitefish Municipal Water Util.* [1922 E] Pub. Util. Rep. (Mont.) 198; *Re Interstate Water Co.* [1922 E] Pub. Util. Rep. (Ill.) 246; *Re Pacific Power & Light Co.* [1922 E] Pub. Util. Rep. (Or.) 275; *Re Tucson Gas, Light & Power Co.* [1922 C] Pub. Util. Rep. (Ariz.) 658; *Re So. Calif. Tel. Co.* [1922 C] Pub. Util. Rep. (Calif.) 97; *Re Pacific Elec. Ry.* [1922 C] Pub. Util. Rep. (Calif.) 134; *Re Pub. Service Gas Co.* [1922 C] Pub. Util. Rep. (N. J.) 493; *Re Molalla Elec. Co.* [1922 C] Pub. Util. Rep. (Or.) 810; see NOTE AND COMMENT (1921) 19 MICH. L. REV. 849.

¹⁴ "We can determine the worth of the service furnished by any utility on a mathematical basis by adding to the operating cost the current rate of interest on the capital which actually and prudently has been put into, and remains in, the enterprise. If the books of a utility are properly kept, those books will show the exact amount of money which has been invested. If the books are not properly kept, competent engineers and accountants can determine with reasonable accuracy the amount of prudent investment which must have been made in the development of the properties, using the historical reproduction cost, not as the basis for determining any elusive 'value' of the property, but for the simple purpose of determining the capital cost of the services." Richberg, *op. cit. supra* note 10, at p. 273.

¹⁵ This is not the same as allowing enhanced values and care must be taken to keep the two distinct. The argument for allowing this is well stated in *Consolidated Gas Co. v. Newton*, *supra* note 6, although the case is decided on the fair-value rule.

the last analysis, giving justice to the public and allowing a rate that will induce investment now, is the true criterion.¹⁸

APPLICATION OF THE LAW OF NUISANCE TO UNREGISTERED AUTOMOBILES

By interpretation of a statute a series of decisions has firmly established the principle in Massachusetts that an unregistered automobile is a nuisance on the public highway and its driver is a trespasser.¹ This leads to two results: In the absence of reckless, wanton, or wilful misconduct the operator of the outlawed machine can not recover for any injuries to himself or to his property;² and secondly, he is liable for all damages to others directly resulting from such unlawful operation irrespective of negligence on his part.³ In Maine a similar statute has been construed in like manner.⁴ Connecticut has reached an analogous result by a statute which expressly provides that there shall be no recovery of damages by the owner or the operator of, or by any passenger in, an automobile that is not duly registered.⁵

However, the great majority of courts in passing on the effect of non-registration of automobiles have attained a different result on the theory

¹⁸ This theory, too, is open to objections, one of which is that investors may have purchased the stock either above or below par and consequently their return may not always be equitable. The fair-value rule is open to objection on the same ground, and in addition it encourages further haphazard investment. On the whole, the "prudent investment theory" seems sounder. It is also worthy of note that when the Interstate Commerce Commission completes its valuation of all the property used by common carriers as ordered by sec. 19a of the Interstate Commerce Act, Act of Feb. 28, 1920 (41 Stat. at L. 456), the vast amount of data may be employed in determining rates under the "prudent investment theory," since the Act provides in sec. 15a that "the Commission may utilize the results of its investigation . . . and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes." See Artaud, *A Review of the Federal Valuation of Railroads* (1922) 32 YALE LAW JOURNAL, 37, 46.

¹ Beginning with *Dudley v. Northampton St. Ry.* (1909) 202 Mass. 443, 89 N. E. 25, interpreting Mass. Sts. 1903, ch. 473, sec. 1, as amended by Sts. 1905, ch. 311, sec. 2; and culminating in *Gondek v. Cudahy Packing Co.* (1919) 233 Mass. 105, 123 N. E. 398, and *Pierce v. Hutchinson* (1922, Mass.) 136 N. E. 261; (1923) 71 U. PA. L. REV. 166.

² *Holden v. McGillicuddy* (1913) 215 Mass. 563, 102 N. E. 923; *Dean v. Boston Elevated Ry.* (1914) 217 Mass. 495, 105 N. E. 616.

³ *Fairbanks v. Kemp* (1917) 226 Mass. 75, 115 N. E. 240; *Koonovsky v. Queltette* (1917) 226 Mass. 474, 116 N. E. 243. Moreover, the owner of an unregistered automobile who permits another to operate it is liable for the damages resulting from such operation. *Gould v. Elder* (1914) 219 Mass. 396, 107 N. E. 59; *Evans v. Rice* (1921) 238 Mass. 318, 130 N. E. 672.

⁴ Me. Pub. Laws, 1911, ch. 162, sec. 11, construed in *McCarthy v. Inhabitants of Town of Leeds* (1916) 115 Me. 134, 98 Atl. 72.

⁵ Conn. Gen. Sts. 1918, ch. 77, sec. 1565; *Brown v. New Haven Taxicab Co.* (1917) 92 Conn. 252, 102 Atl. 573. Connecticut does not go so far as to hold such a driver liable for damage to others, irrespective of his own negligence.

that the failure to obey the law in regard to registration is not a proximate cause of the injury, and that the plaintiff cannot be denied recovery or the defendant's liability established solely on that ground.⁶ This view harmonizes with the other decisions on the question of civil liability for injuries connected with the breach of a statutory duty.⁷ To impose liability on one who violates a statute, two elements must exist—the legislature must have intended to protect the particular class to which the plaintiff belongs from the type of harm that he suffered, and the breach of statute must have been the proximate cause of the injury.⁸

Since registration statutes are not entirely revenue statutes, but are an exercise of the police power for the purpose of controlling and regulating automobiles on the highway,⁹ there is some basis for the view of the Massachusetts courts that the statute was intended to safeguard from risk of injury persons lawfully using the highway.¹⁰ But since it is difficult, if not impossible, to refute the contention that an accident would have happened even though every automobile involved had been registered, it seems that in these cases rights are being extinguished and duties created without much reference to the ordinary principles of legal causation.¹¹

In *McDonald v. Dundon* (1922, Mass.) 136 N. E. 264, an automobile dealer loaned a set of license plates for use on another person's car.

⁶ It does not preclude recovery. *Stovall v. Corey-Highlands Land Co.* (1914) 189 Ala. 576, 66 So. 577; *Southern Ry. v. Vaughan's Admr.* (1916) 118 Va. 692, 88 S. E. 305; *Wilford v. City of Grinnell* (1917) 179 Iowa, 689, 161 N. W. 686. It does not establish liability. *Lindsay v. Cecchi* (1911, Del.) 3 Boyce, 133, 80 Atl. 523; *Hyde v. McCreery* (1911) 145 App. Div. 729, 130 N. Y. Supp. 269; *Black v. Moree* (1916) 135 Tenn. 73, 185 S. W. 682.

⁷ *Flaherty v. Metro Stations* (1922, Sup. Ct.) 196 N. Y. Supp. 2 (violation of statute prescribing the kind of structures to be used for storage of oil products held not to be the proximate cause of burns received by a boy who took gasoline from a can catching drippings and carried it to a bonfire some distance away); *Texas & P. Ry. v. Marrujo* (1915, Texas Civ. App.) 172 S. W. 588 (failure to ring bell when approaching crossing as required by statute not the proximate cause of the death of one who with unobstructed view crosses track in front of approaching train); *Paietta v. Illinois Zinc Co.* (1912) 257 Ill. 11, 100 N. E. 218 (failure to mark danger on loose rock as required by statute is not the proximate cause of death of a miner who is removing it); *Steel Car Forge Co. v. Chec* (1911) 107 C. C. A. 192, 184 Fed. 868 (violation of child labor statute not the proximate cause of an injury received in the course of employment). As to violation of statutes regarding automobiles, see *Armstead v. Lounsberry* (1915) 129 Minn. 34, 151 N. W. 542; *Derr v. Chicago M. & St. P. Ry.* (1916) 163 Wis. 234, 157 N. W. 753.

⁸ *Schaar v. Conforth* (1915) 128 Minn. 460, 151 N. W. 275; *Di Caprio v. N. Y. Cent. Ry.* (1921) 231 N. Y. 94, 131 N. E. 746; COMMENTS (1922) 10 CALIF. L. REV. 255; Thayer, *Public Wrong and Private Action* (1914) 27 HARV. L. REV. 317.

⁹ See *Greig v. City of Merritt* (1913, Br. Col.) 11 Dom. Law Rep. 852, 854; Huddy, *Automobiles* (1922, 6th ed.) 104.

¹⁰ See *Dudley v. Northampton St. Ry.*, *supra* note 1.

¹¹ *Supra* note 8.

The operator was held liable for damages resulting to the plaintiff from an accident, on the ground that the unregistered automobile was a nuisance. Liability was also imposed upon the dealer due to the fact that by the lending of the license plates he had made possible the commission of the nuisance. This decision is an extreme development of vicarious liability. But in view of the fact that it is well established that all persons who contribute to or participate in the commission of a nuisance are liable for all injuries proximately resulting therefrom,¹² however much we may disagree with the soundness of the Massachusetts rule, this case may be justified as a logical extension of the general doctrine.

A word is "the skin of a living thought."¹³ Thoughts are more numerous than words. Hence, at times, different thoughts wear the same skin. From this results the necessity of ascertaining whether a given word may properly cover more than one thought, and if it does, of ascertaining which thought it covers when it is used in a particular sentence and the advisability of restrictions either by convention, for example, the use of Hohfeld's terminology, or by qualifying words or phrases which shall bring it about that a word or phrase always covers the same thought.

Whitehill v. Halbing (1922) 98 Conn. 21, 118 Atl. 454,² interprets a Connecticut statute which reads as follows:

"Sec. 4946. Revocation of a *will*. If, after the making of a *will*, the testator shall marry, or if a child is born to the testator, and no provision is made in the *will* for such contingency, such marriage or birth shall operate as a revocation of such *will*. No *will* or codicil shall be revoked in any other manner except by burning, cancelling, tearing or obliterating it by the testator or by some person in his presence by his direction or by a later *will* or codicil."³

The statute itself demonstrates that the word "will" the first five times it is used means an instrument executed with the statutory formalities, which has not yet been made effective by the death of the testator. If becoming effective because of the death of the testator were necessary to make a document a "will," a will would never be revoked either by marriage or by burning, etc., or by a later will. The word is used with the same signification in the General Statutes of Connecticut, 1918, sec. 4947.

¹² *Cohen v. Mayor of New York* (1889) 113 N. Y. 532, 21 N. E. 700; *Board of Chosen Freeholders of Hudson Co. v. Woodcliff Land Improvement Co.* (1907) 74 N. J. L. 355, 65 Atl. 844; Wood, *Nuisances* (1875, 3d ed.) sec. 31.

¹³ *Towne v. Eisner* (1917) 245 U. S. 418, 425, 38 Sup. Ct. 158, 159.

² See COMMENTS (1922) 32 YALE LAW JOURNAL, 70.

³ Italics are the author's.

The statement that a will is always ambulatory is meaningless unless the word "will" means merely a document duly executed. In the majority opinion in the instant case, the word is repeatedly used as a skin for the same thought. This accords with popular usage. Living men refer to their "wills." On the other hand the majority opinion quotes authorities which demonstrate that at times the word means a document made effective by death. The real question before the court, therefore, was which of the two thoughts was covered by the skin "will" when it was used for the sixth and last time in the section quoted.

In view of the foregoing it is manifest that the question cannot be answered by an appeal to definitions of the word which make effectiveness by reason of the death of the testator an essential element before a document can be called a will. Such definitions show merely that this is a meaning of the word—not that it is the only meaning.

The question, therefore, is whether the state of the law at the time of the enactment of the statute, or public policy, or both, overcome the strong natural inference that when the legislature had used a word five times in a statute, always with the same meaning, it there abandons this meaning, and when using it for the sixth and last time refers to something else. The joining with it of the adjective "later," if anything, would seem to strengthen the inference that it did not intend to abandon it.

The state of the law and the considerations of public policy are so fully stated in the opinions and in the earlier comment⁴ that further discussion seems unnecessary. The purpose of this comment is merely to call attention to the case as an interesting example of the use of the same word to indicate two different meanings, and of the importance of having this fact in mind when considering statutes in which it appears.

One matter of policy may, however, be suggested. The execution of a second will with a revoking clause demonstrates the abandonment of the intention expressed by the first will. If the testator again adopts the original intention, such adoption may, under the decision in the instant case, be made effective by a destruction of the second will. As Chief Justice Wheeler points out, such destruction is essentially a testamentary act. It should be effective only if the testator acts freely and has testamentary capacity. It would seem to accord with our policy to safeguard every testamentary act by requiring witnesses who can fix the time and attest the capacity of the testator and the regularity of this act. Otherwise it would be difficult, if not impossible, to prove incapacity or undue influence.

The possible harm resulting from the impossibility of fixing the time when the revocation took place and the resulting difficulty in ascertaining whether or not the testator then had capacity and acted freely is

⁴ *Supra* note 2.

much greater under the rule in the instant case than it would be if the result of revocation was intestacy, because the law views intestacy as normal and requiring no safeguards, whereas experience has shown the necessity of safeguards around testamentary acts.

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"Such words as 'right' are a constant solicitation to fallacy." Thus speaks Mr. Justice Holmes in a recent opinion involving an interesting point in the law of Pennsylvania relating to party walls. *Jackman v. Rosenbaum Co.* (1922, U. S.) 43 Sup. Ct. 9. The plaintiff owned in Pittsburgh a theatre building one wall of which ran along, but not over, the dividing line between his property and the adjacent lot of the defendant. The latter, in erecting a department store building, began the erection of a party wall, intending to incorporate therein the old wall of the plaintiff's theatre. But the city authorities decided that the old wall was not safe for this purpose and ordered its removal. This was done by the contractor in charge of erecting the defendant's building. For damages thus caused, the plaintiff sued, alleging loss of rental for a theatrical season and expenses in restoring the theatre to its former condition. The defendant justified the destruction of the old wall and the erection of the party wall by virtue of a statute,¹ and denied responsibility for any damage necessarily incident to the exercise of this statutory privilege. To this contention the plaintiff replied that if the statute were interpreted to exclude recovery of damages without proof of negligence, it was contrary to the Fourteenth Amendment. The court refused so to hold. A verdict for the plaintiff was set aside and a judgment for the defendant *non obstante veredicto* was affirmed by the state Supreme Court.²

The fallacy of the plaintiff's argument consists in the assumption that he has a "right" that the adjacent property owner shall not use a portion of the plaintiff's land for a party wall without compensating him for damages thereby caused. Mr. Justice Holmes goes on to expound the fallacy with his usual clarity of thought and of expression:

"We say a man has a right to the land that he has bought, and that to subject a strip six inches or a foot wide to liability to use for a party

¹ This statute is the Act of June 7, 1895 (Pa. Sts. 1920, sec. 4046 *et seq.*). The opinion refers to the fact that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed ever since, as is illustrated by statutes going back to 1721. Mr. Justice Holmes says: "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, . . ."

² (1919) 263 Pa. 158, 106 Atl. 238.

wall therefore takes his right to that extent. It might be so, and we might be driven to the economic and social considerations that we have mentioned, if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the landowner does not have the right to that part of his land except as so qualified, and the statute that embodies that understanding does not need to invoke the police power."

The value of having an invariable meaning for the word "right" has been often emphasized.³ Accurate terminology does not *solve* legal problems but it turns the spot-light on them so that lawyer and judge may see more clearly the principles, historic, political, or economic, which control the decision. To argue that the plaintiff had a "right" to his six-inch strip of land and therefore that the defendant must make compensation for damages caused by its use for a party wall is to beg the question: the very issue in dispute is whether the legal relation between the parties with respect to damages caused by using that strip for party wall purposes is one of right-duty, or of no-right-privilege. When the issue is thus disclosed, Pennsylvania history settles it. In some other state, where the history of party wall customs has been different, the right-duty relation might prevail,⁴ or, if a statutory privilege had been granted the adjacent owner, such privilege might have to be sustained under the rubric of police power.⁵

The problem of legal causation has its interest even for the taxpayer and the brewer. The income tax law of New Zealand permits the taxpayers to deduct expenditures "exclusively incurred in the production of the assessable income." A brewer expended 2,123l. 3s. 11d. for the purpose of defeating the enactment of a prohibitory law at one of the triennial polls which are provided for by the law of New Zealand. In *Ward & Co. v. Commissioner of Taxes* (1922, P. C.) 39 T. L. R. 90, the unfeeling Judicial Committee of the Privy Council refused to allow the brewer to deduct his expenditure for the above purpose from the taxable income of his business. It was contended that "it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax." The court, however, was not dealing with equities but with legal causation, and it held that the expenditure in question "was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing."

³ See COMMENTS (1922) 32 YALE LAW JOURNAL, 157, note 2.

⁴ See *Brooks v. Curtis* (1873) 50 N. Y. 644; *Fowler v. Saks* (1890) 18 D. C. 570; 7 L. R. A. 649, note; *Fowler v. Koehler* (1915, D. C.) 43 App. Cas. 349; Ann. Cas. 1916 E 1165, note.

⁵ See 20 R. C. L. 1087; *Walker v. Gish* (January 2, 1923) U. S. Sup. Ct., Oct. Term, 1922, No. 135.